FILED

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOE ALFRED IZEN, JR., CONROE OFFICE BUILDING, LTD., AND L. T. BRADT,

Petitioners,

V.

JOHN FLOYD NICHOLS and DEENA COUNTS NICHOLS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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61 pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE:

1. DOES THE COURT OF APPEALS HAVE JURISDICTION OVER AN APPEAL FROM A DISTRICT COURT'S ORDER AFFIRMING IN PART, AND VACATING IN PART, A BANKRUPTCY COURT'S JUDGMENT WHICH GRANTS A PERMANENT INJUNCTION? [11 U.S.C. 541; 28 U.S.C. SECTIONS 1291 AND 1292]

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NO._____

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JOE ALFRED IZEN, JR., CONROE OFFICE BUILDING, LTD., AND L. T. BRADT,
Petitioners,

v.

JOHN FLOYD NICHOLS and DEENA COUNTS NICHOLS,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Joe Alfred Izen, Jr., Conroe Office Building, Ltd., and L. T. Bradt, file this Petition for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit which dismissed Petitioners' appeal from the Judgment of the United States District Court for the Southern District of Texas, Honorable Sim Lake, Vacating in Part and Affirming in Part, the Memorandum Opinion and Judgment entered by the United States Bankruptcy Court for the Southern District of Texas, Honorable Manual Leal, refusing to modify the Respondents' 11 U.S.C. Section 524 Discharge Injunction so as to allow pursuit of collection

against Respondent's, John F. Nichols', legal malpractice policy and granting a permanent injunction. See Appendix D.

REPORTS OF OPINIONS BELOW

A copy of the Order of the United States Court of Appeals for the Fifth Circuit dismissing Petitioners' appeal for alleged want of jurisdiction is attached as Appendix A. The Final Judgment of the United States District Court for the Southern District of Texas affirming in part and vacating in part the Bankruptcy Court's earlier judgment is attached as Appendix B. The Memorandum and Order entered by the United States District Court for the Southern District of Texas explaining the grounds on which it vacated in part and affirmed in part the Bankruptcy Court's Judgment is attached as Appendix C. The Judgment of the United States Bankruptcy Court for the Southern District of Texas permanently enjoining Petitioners from continuing to pursue "...any means of holding John Floyd Nichols and his wife, Deena Counts Nichols, personally liable for the claims constituting Cause No. 59,359 now pending in the 328th Judicial District Court of Fort Bend County, Texas including the claim for conversion and the claim for malpractice..." is attached as Exhibit D. The Memorandum Opinion of the United States Bankruptcy Court setting out the Bankruptcy Court's Findings and Conclusions in Support of its August 21, 1992 Judgment is attached as Appendix E.

JURISDICTION

This is a civil appeal from a United States Court of Appeals. The United States Court of Appeals for the Fifth Circuit issued and entered its opinion on May 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The following statutes are involved in this case: 11 U.S.C. Sections 524 and 541. These are set forth in Appendices C and D.

28 U.S.C. Sections 158(d), 1291 and 1292(a)(1). These are set forth in Appendix A.

There are no constitutional provisions involved in this case.

SUMMARY OF THE CASE

This case involves the question whether the United States Court of Appeals may refuse to exercise jurisdiction over an appeal from a District Court's appellate ruling involving a bankruptcy injunction where the District Court remands the case to the Bankruptcy Court for further proceedings, but otherwise affirms the Bankruptcy Court's injunction.

STATEMENT OF FACTS

The United States Court of Appeals for the Fifth Circuit purported to dismiss Petitioners' appeal from the ruling of the United States District Court for the Southern District of Texas finding lack ofjurisdiction under 28 U.S.C. Section 158(d) and 28 U.S.C. Sections 1291-1292. See Appendix A. The Bankruptcy Court's injunction is based on 11 U.S.C. Section 524 governing a Debtor's discharge. Title 11 U.S.C. Section 524 provides that a Debtor's discharge in bankruptcy operates as an injunction against all acts or proceedings involving the Debtor's prepetition personal liabilities.

The United States Bankruptcy Court for the Southern District of Texas entered a permanent injunction directing that Petitioners refrain from "...pursuing any means of holding John Floyd Nichols or his wife, Deena Counts Nichols, personally liable for the claims constituting Cause No. 59,359 now pending in the 328th Judicial District Court of Fort Bend County, Texas, including the claim for conversion and the claim of legal malpractice...."

Petitioners appealed the Judgment of the Bankruptcy Court to the United States District Court for the Southern District of Texas. The District Court affirmed in part and vacated in part the Bankruptcy Court's findings and remanded the case for further evidentiary proceedings. The District Court based its jurisdiction on 28 U.S.C. Section 158.

Petitioners next appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals held that the District Court's order was not appealable under 28 U.S.C. Section 158(d) or 28 U.S.C. Sections 1291-1292.

STATEMENT OF THE CASE

QUESTION ONE

1. DOES THE COURT OF APPEALS HAVE JURISDICTION OVER AN APPEAL FROM A DISTRICT COURT'S ORDER AFFIRMING IN PART, AND VACATING IN PART, A BANKRUPTCY COURT'S JUDGMENT WHICH GRANTS A PERMANENT INJUNCTION? [11 U.S.C. 541; 28 U.S.C. SECTIONS 1291 AND 1292]

The simple question presented here is whether the ruling of the United States Court of Appeals for the Fifth

Circuit conflicts with this Court's ruling in *Connecticut National Bank v. Germaine*, 112 S.Ct. 1146 (1992).

In its reported Opinion, the United States Court of Appeals for the Fifth Circuit announced a rule by which it will refuse to entertain a further appeal from a District Court's appellate ruling involving a Bankruptcy injunction (whether temporary or permanent) where the District Court remands for further proceedings. See Appendix A, P. 443. In essence, the Fifth Circuit refused to recognize that the District Court's order "continued" the Bankruptcy Court's previous injunction for purposes of Section 1292(a)(1).

Did the Court of Appeals have jurisdiction over Petitioner's Appeal of the Bankruptcy Court's discharge Injunction where the District Court vacated, in part, the Bankruptcy Court's findings and remanded the case to the Bankruptcy Court for significant further proceedings? [11 U.S.C. Sect. 524, 28 U.S.C. Sect. 158(d), 28 U.S.C. Sect. 1291 and 1292].

As this Court noted in *Connecticut Nat. Bank v. Germain*, 112 S.Ct. 1146, Title 28 U.S.C. Sect. 158(d) --

> "...Gives the Courts of Appeal jurisdiction over, inter alia appeals from all final orders of District Court sitting as Appellate Courts in Bankruptcy, **but is silent as to review of Interlocutory Orders...."**

Germaine at Page 1147. In so holding, this Court apparently resolved the "conflict between Circuits" on the issue of whether District Court orders reversing a Bankruptcy Court and remanding for further proceedings are appealable. Under *Germaine* the redundancies between Section 1291 and 158(d) do not provide a basis for inferring that both Statutes

are not operable or that Section 158(d) limited, in any manner, the general jurisdictional grant under Section 1291. In criticizing the Second Circuit's reasoning which it reversed this Court noted:

> "The Second Circuit held that a Court of Appeals exercises jurisdiction over Interlocutory Orders in Bankruptcy only when a District Court issues the Order after having withdrawn a proceeding or case from the Bankruptcy Court, and not when the District Court acts in its capacity as a Bankruptcy Court of Appeals. We granted certiorari and now reverse and remand."

Germaine, at Page 1148.

The *Germaine* opinion goes on to note --

"...Nothing in Section 158(d) limits Section 1292...." the same analogous reason must be applied to Section 1291.

The Bankruptcy Court's Order is a permanent injunction. The District Court, sitting as an Appellate Court, did not specifically vacate the Bankruptcy Court's Injunctive Decree. After the District Court issued its Appellate opinion Petitioners were still prevented, by the Bankruptcy Court's Order, from pursuing certain enumerated causes of action against the Respondent Nichols. Judge Lake's decision is, therefore, the type of Order --

> "...Granting, continuing, modifying, refusing, or dissolving Injunction(s), or refusing to dissolve or modify Injunctions..."

described in 28 U.S.C. 1292(a)(1). Thus the District Court's Order was appealable under Section 1292(a)(1) even if it was not a final decision under 28 U.S.C. Section 1291.

This Court has already ruled, in the *Germaine* decision, that Sections 1291 - 1292 and Section 158(d) must be read separately in determining jurisdiction.

Judge Lake's Order is either final or Interlocutory. The Court of Appeals had jurisdiction in any event, whether under Section 1291 or Section 1292. As stated by this Court--

> "...There is no reason to infer from either Section 1292 or Section 158(d) that Congress meant to limit Appellate review of Interlocutory Orders in Bankruptcy proceedings..."

The United States Court of Appeals for the Fifth Circuit had jurisdiction over Petitioner's Appeal. Petitioners' failure to appeal Judge Lake's Order would subject them to the bar of res judicata or collateral estoppel under this Court's *Germaine* decision.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. The Fifth Circuit violated the dictates of this Court's decision in *Germaine* when it held that the District Court Order continuing the Bankruptcy Court's Permanent Injunction was not appealable under 28 U.S.C. Sections 1291 and 1292. As such, the Fifth Circuit's Decision directly conflicts with this Court's Decision in *Germaine*.

Reversal of the Fifth Circuit's opinion is mandated in order to ensure uniform application of the decision of this Court in *Connecticut Nat. Bank v. Germaine, Supra.*

CONCLUSION

For all of the above reasons stated herein, this Petition for Writ of Certiorari should be granted and the Court of Appeals' Order of Dismissal reversed.

Respectfully submitted,

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APPENDIX A

MATTER OF NICHOLS

In the Matter of John Floyd NICHOLS and Deena Counts Nichols, Debtors.

CONROE OFFICE BUILDING LTD., et al., Appellants,

v.

John Floyd NICHOLS, et al., Appellees.

No. 93-2394

United States Court of Appeals,
Fifth Circuit.

May 31, 1994

Discharged Chapter 7 debtors sought to reopen case in order to determine dischargeability of debts. The United States Bankruptcy Court for the Southern District of Texas held for debtors, and creditors appealed. The District Court, Sim Lake, J., affirmed in part, reversed in part, and remanded. On appeal, the Court of Appeals, Wisdom, Circuit Judge, held that district court's decision was neither final nor appealable interlocutory order.

Appeal dismissed.

1. **Bankruptcy** **3767**

District court order reversing bankruptcy judge and remanding case to bankruptcy court for significant further

proceedings was not final, and thus not appealable. 28 U.S.C.A. §§ 158(d), 1291.

2. **Bankruptcy** **3768**

District court order reversing bankruptcy judge and remanding case to bankruptcy court for significant further proceedings was not appealable interlocutory order; order did not rule on injunction and district court did not rule on injunction and district court did not certify its decision for appeal. 28 U.S.C.A. § 1292(a,b).

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM and BARKSDALE, Circuit Judges, and HARMON,• District Judge.

WISDOM, Circuit Judge.

This case presents the question whether a district court's order reversing a bankruptcy judge and remanding the case to the bankruptcy court for significant further proceedings is appealable. This Court has previously held that such an order is not appealable under 28 U.S.C. § 158(d).[1] Today we hold that the order in this case is not

• District Judge of the Southern District of Texas, sitting by designation.

---

[1] *See In re Bowman*, 821 F.2d 245 (5th Cir. 1987).

appealable under 28 U.S.C. §§ 1291-1292, either. Accordingly, we have no jurisdiction to decide the merits of the appellant's appeal, and we DISMISS the appeal.

I.

Appellees John Floyd Nichols, an attorney, and his wife Deena Counts Nichols (collectively, "the debtors") are the debtors in the Chapter 7 bankruptcy proceeding underlying this appeal. Appellant Conroe Office Building Ltd. ("Conroe") is a limited partnership in which appellant Joe Izen, Jr., is a limited partner. Izen had control over Conroe's bank amount.

John Floyd Nichols represented Martha Mackin Izen, the wife of Joe Izen, Jr., in a divorce action. Martha Mackin Izen, without authorization from Joe Izen, Jr., allegedly paid Nichols a retainer with funds she had withdrawn from Conroe's bank account. Upon learning of the unauthorized withdrawal, Joe Izen sued his wife and Nichols for conversion. Conroe intervened as a plaintiff in the state conversion proceeding.

The debtors, John Floyd Nichols and Deena Counts Nichols, then filed a bankruptcy petition. Their schedules listed Joe Izen, Jr. and Conroe as creditors with this claim described as "disputed". Izen and Conroe requested that the bankruptcy court lift the automatic stay to permit them to continue prosecuting their conversion claim against Nichols in state court. The bankruptcy court granted their motion to lift the stay. Martha Mackin Izen then crossclaimed against Nichols in the state court lawsuit for legal malpractice in connection with his representation of her in the divorce action. Martha Mackin Izen assigned Joe Izen, Jr. 50% of her mal-practice claim against Nichols. Nichols never listed Martha Mackin Izen as a creditor on his bankruptcy schedules.

The bankruptcy court granted the debtors a discharge on May 4, 1988. Izen and Conroe had never objected to the discharge or challenged the dischargeability of the Nichol's debt to them, but had merely continued to prosecute their conversion lawsuit in state court.

After obtaining his discharge in bankruptcy, Nichols moved for summary judgment in the state court proceeding on the grounds that any liability to which he had been subject had been discharged. The state court denied his motion. The debtors then petitioned the bankruptcy court to reopen their bankruptcy proceeding. The bankruptcy court did so on

October 22, 1991. The bankruptcy judge, after an evidentiary hearing, determined that the conversion claim and legal malpractice crossclaim were pre-petition claims that had been discharged. The bankruptcy judge then enjoined the appellants "from further pursuing any means of holding John Floyd Nichols or his wife, Deena Courts Nichols, personally liable for the claims....., including the claim for conversion and the claim of legal malpractice based on debtor John Floyd Nichols' prepetition acts".

Izen and Conroe appealed to the district court. The district court rejected their argument that the bankruptcy court abused its discretion in reopening the bankruptcy more than three years after the discharge. It reversed and remanded, however, on the question whether the legal malpractice crossclaim had arisen pre-petition, given that some factual allegations had been made concerning Nichols's post-petition conduct. The district court remanded the malpractice claim to the bankruptcy judge because the debtors had not listed Martha Mackin Izen as a creditor on their schedules and the bankruptcy court's opinion did not discuss whether she had notice or actual knowledge of the bankruptcy. The district court also remanded a claim against Nichols for wrongful interference with Conroe's funds, finding that the bankruptcy court had not addressed that claim. Finally, the district court remanded this case to the bankruptcy court for an explanation why the bankruptcy judge denied the appellants' request to modify the injunction to allow them to seek recovery from the debtors' insurance carrier despite a proffered stipulation that they would not seek recovery from the debtors' estate. The district court affirmed the bankruptcy judge in all other respects.

The appellants appealed the district court's order to this Court, challenging the district court's affirmance of most of the bankruptcy judge's ruling. We raised the question of

our own jurisdiction *sua sponte* and ordered supplemental briefing on the issue. After reviewing the supplemental briefs, we conclude that the district court's order remanding the case to the bankruptcy court was neither a final appealable order nor an appealable interlocutory order, and thus we have no jurisdiction to review it.

II.

A. Appealability Under 28 U.S.C. §158(d)

[1] 28 U.S.C. § 158(d) lodges jurisdiction in the courts of appeals over appeals from "final decisions, judgments, orders, and decrees" in bankruptcy matters entered under § 158(a) and (b). It does not, however, confer jurisdiction over appeals from interlocutory orders of district courts. [2] In *In re Bowman*[3] we held that when a district court sitting as a court of appeals in bankruptcy remands a case to the bankruptcy court for significant further proceedings, the remand order is not "final" and therefore not appealable under § 158(d). We explained that "[a] final order is one in which nothing remains to be done but the mechanical entry of judgment by the trial court". [4] The order remanding the case to the bankruptcy court for significant further proceedings was not "final" under that standard. It is therefore unappealable under § 158(d).

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[2] *See In re Topco, Inc.*, 894 F.2d 727, 735-36 n. 12 (5th Cir.), *reh'g en banc denied*, 902 F.2d 955 (5th Cir. 1990), and cases collected therein.

[3] 821 F.2d 245 (5th Cir. 1987).

[4] *Id.* at 247 (internal quotations omitted).

B. appealability Under 28 U.S.C. § 1291

The appellants' supplemental brief replies also on 28 U.S.C. § 1291, which governs appeals from final decisions of district courts. This argument, however, fails for the same reason the appellants' § 158(d) argument failed: a district court order reversing and remanding a case for significant further proceedings in the bankruptcy court is not considered "final" for purposes of appellate review. For purposes of § 1291. a final judgment is a decision that "ends the litigation on the merits and leaves nothing for the district court to do but execute the judgment".[5] The district court remanded this case to the bankruptcy court for consideration of several significant issues the resolution of which might cause an amendment of the bankruptcy court's decision and modification of the bankruptcy injunction. The district court determined that the bankruptcy judge's decision is currently incomplete and not ready for execution until previously unaddressed issues are adjudicated. Thus, the district court's order and the bankruptcy court's order are not "final" within the meaning of § 1291.

The Supreme Court's recent decision in *Connecticut Nat'l Bank v. Germain*[6] does not change this result. *Germain* noted that "[s]ections 1291 and 158(d) do overlap, therefore, but each section confers jurisdiction over other cases that the other section does not reach".[7] It is precisely

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[5] *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373, 101 S.Ct. 669, 672-73, 66 L.Ed.2d 571 (1981) (internal quotations and citation omitted); *In re England*, 975 F.2d 1168, 1171 (5th Cir. 1992).

[6] 503 U.S.—, 112 S.Ct 1146, 117 L.Ed.2d 391 (1992).

[7] *Id.* at —, 112 S.Ct. at 1149, 117 L.Ed.2d at 397.

in that area of overlap, however, that jurisdiction fails in this case. The district court's order is not "final" under either § 158(d) or § 1291.[8]

C. Appealability Under 28 U.S.C. § 1292

[2] The Supreme Court in *Connecticut Nat'l Bank v. Germain* held that an interlocutory order in a bankruptcy case which fails to meet the requirements of 28 U.S.C. § 158(d) may still be appealable if it meets the independent requirement of § 1292, which governs interlocutory appeals.[9] We must, therefore, consider whether § 1292 confers jurisdiction over this appeal.

---

[8] We have previously observed that "finality" may be a stricter requirement under §1291 than under § 158. *See, e.g., In re Wood & Locker, Inc.*, 868 F.2d 139, 144 (5th Cir. 1989). We need not consider in this case whether the Supreme court's holding in *Germain* calls that line of cases into doubt. Other circuits have acknowledged possible tension between *Germain* and the prior lines of authority without finding it necessary to resolve them. *See, e.g., In re Bonner Mall Partnership*, 2 F.3d 899, 904 n. 11 (9th Cir. 1993), *cert. granted sub nom. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,—U.S.—, 114 S.Ct. 681, 126 L.Ed.2d 648 (1994), *removed from oral argument calendar*, —U.S.—, 114 S.Ct. 1367, 128 L.Ed.2d 44 (1994); *In re Gould*, 977 F.2d 1038, 1040-41 & n.2 (7th Cir. 1992). Whether we define "finality" under § 158 less stringently than under § 1291 or not, however, plainly the district court's remand order in this case fails either test.

[9] 503 U.S. at —, 112 S.Ct. at 1150, 117 L.Ed.2d at 398 ("So long as a party to a proceeding or case in bankruptcy meets the conditions imposed by § 1292, a court of appeals may rely on that statute as a basis for jurisdiction".). *Germain* abrogated our holding in *In re Hester*, 899 F.2d 361, 365 (5th Cir. 1990), and the cases cited therein, that "the bankruptcy appellate scheme embedded in 28 U.S.C. § 158 clearly supersedes 28 U.S.C. 1291, and, by inference, also supersedes section 1292".

We first conclude that the district court's remand order does not fall within § 1292(a)(1)'s provision allowing interlocutory appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions". The district court's order did none of those things. The *bankruptcy* court may modify its own injunction after the remand, or it may not, but the district court here did not do so. Accordingly, § 1292(a)(1) provides no basis for an interlocutory appeal to this court. The remaining provisions of § 1292(a) are plainly inapplicable to this case. Finally, § 1292(b) provides no basis for appellate jurisdiction because the district court did not certify its decision for appeal.

III.

We conclude that the appellants' attempt to involve the court of appeals in this dispute is premature. The bankruptcy court is the appropriate forum in which to resolve those issues remanded to it by the district court, following which the ordinary appeals process to the district court and to this court will become available. For now, however jurisdiction is lacking. Accordingly, we DISMISS this appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 16 1993
Michael N. Milby, Clerk
By Deputy: /s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
JOHN FLOYD NICHOLS and	§	
DEANA COUNTS NICHOLS,	§	
Debtors.	§	**CIVIL ACTION NO.**
	§	**H-92-3610**
JOE ALFRED IZEN, JR.,	§	
L.T. BRADT, and CONROE	§	
OFFICE BUILDING, LTD.,	§	**(Consolidated with**
Appellants,	§	**H-92-3611)**
	§	
v.	§	**(Bankruptcy No.**
	§	**87-11516 H5-7)**
JOHN FLOYD NICHOLS and	§	
DEANA COUNTS NICHOLS,	§	
Appellees.	§	

FINAL JUDGMENT

In accordance with the court's **Memorandum and Order**, this case is **REMANDED** to the bankruptcy court for findings of fact and conclusions of law on the issues of:

(1) whether John Nichols' objection to the withdrawal of the converted funds in the registry of the Fort Bend County court, allegedly filed without the advice and consent of his client, Martha Mackin Izen, and in conflict with her interests, was a postpetition act of malpractice, and, if so, whether it can be discharged;

(2) whether Martha Mackin Izen had sufficient notice or knowledge of the Nichols' bankruptcy to permit discharge of her malpractice claims;

(3) whether John Nichols' alleged wrongful interference with the converted funds in the registry of the Fort Bend County court was a postpetition independent tort against the appellants, and, if so, whether it can be discharged; and

(4) why the bankruptcy court refused to modify its discharge order to permit the appellants to pursue the Nichols' insurer.

The bankruptcy court's decision is **AFFIRMED** in all other respects.

SIGNED at Houston, Texas, this 16th day of April, 1993.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX C

RECEIVED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 16 1993
Michael N. Milby, Clerk
By Deputy: /s/ cp

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
JOHN FLOYD NICHOLS and	§	
DEANA COUNTS NICHOLS,	§	
Debtors.	§	
	§	
———————————	§	**CIVIL ACTION NO.**
	§	**H-92-3610**
JOE ALFRED IZEN, JR., L.T.	§	
BRADT, and CONROE OFFICE	§	**(Consolidated with**
BUILDING, LTD.,	§	**H-92-3611)**
Appellants,	§	
v.	§	**(Bankruptcy No.**
	§	**87-11516 H5-7)**
JOHN FLOYD NICHOLS and	§	
DEANA COUNTS NICHOLS,	§	
Appellees.	§	

MEMORANDUM AND ORDER

Pending before the court are the consolidated appeals of Joe Alfred Izen, Jr., L.T. Bradt, and Conroe Office Building, Ltd. of the Memorandum Opinion and Judgment of

the bankruptcy court dated August 21, 1992, and various orders entered before and after the judgment.[1] As grounds for relief appellants argue that:

(1) the bankruptcy court erred in reopening the Chapter 7 bankruptcy of the debtors, John Floyd Nichols and Deana Counts Nichols, because the Nichols' motion to reopen was untimely and because the Nichols elected a state court forum in which to litigate the dischargeability of appellants' claims;

(2) the bankruptcy court erred in holding that appellants' claims against the Nichols were prepetition and therefore discharged;

(3) the bankruptcy court abused its discretion and violated Title 11 U.S.C. § 524 by refusing to modify its injunction to permit appellants to establish the Nichols' liability in state court in order for appellants to recover against the Nichols' insurer;

(4) the bankruptcy court abused its discretion by denying appellants' motion for a new trial, and

---

[1] H-92-3610 is an appeal of the bankruptcy court's order reopening the debtors' bankruptcy case, the Judgment and Memorandum Opinion, the injunction, and the denial of appellants' motion for new trial. H-92-3611 is an appeal from the bankruptcy court's denial of appellants' motion to modify the court's injunction.

(5) Bankruptcy Judge Karen R. Brown abused her discretion when she recused herself without stating any reasons for recusal on the record.

(Appellants' Brief at 20-21, Docket Entry No. 5 in H-92-3610)

I. Standard of Review

The court has jurisdiction to hear this appeal pursuant to 28 U.S.C. §158. The standard of review of a bankruptcy court's factual determinations is set forth in Bankruptcy Rule 8013:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

The burden is on the appellants to show a reviewing court that a factual finding is "clearly erroneous." Reversal is proper only when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In re Multiponics, Inc., 622 F.2d 709, 723 (5th Cir. 1980) (citation omitted). "Any conclusion of law, of course, is subject to de novo review." In re Jordan, 927 F.2d 221, 224 (5th Cir. 1991). When reviewing mixed questions of law and fact the court must give deference to the factual determinations made by the bankruptcy court unless clearly erroneous, but the court "must independently determine the ultimate legal conclusions adopted by the bankruptcy judge on the basis of the facts found." In re Bowyer, 932 F.2d 1100, 1101 (5th Cir. 1991); In re Bufkin

Bros., Inc., 757 F.2d 1573, 1577-78 (5th Cir. 1985). See also Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 103 (3rd Cir. 1981).

II. Factual Background

Because the timing of certain interrelated events is crucial to several of the issues in this appeal, the court must discuss in some detail the factual background of the appeal. Conroe Office Building, Ltd. was a partnership in which Joe Izen, Jr. was a partner. On February 18, 1987, while still married to Joe Izen, Jr., Martha Mackin Izen withdrew $42,779.45 from Conroe Office Building, Ltd.'s bank account on which she was a signatory. Two days later Martha Mackin Izen paid attorney John Nichols $25,000 to represent her in a divorce action against her husband. John Nichols then filed suit for divorce on behalf of Martha Mackin Izen against Joe Izen, Jr. in Fort Bend County, Texas. (Bankruptcy Court's Memorandum Opinion at 2)

On April 28, 1987, Conroe Office Building, Ltd. made a written demand that John Nichols return the funds withdrawn by Martha Mackin Izen. On December 2, 1987, Joe Izen, Jr. sued John Nichols, Martha Mackin Izen and others in state court for conversion. (Bankruptcy Court's Memorandum Opinion at 2-3) The conversion claims (and later-filed attorney malpractice claims) are still pending as Cause No. 59,359, Joe Alfred Izen, Jr. v. Conroe Office Building, Ltd. v. John F. Nichols, et al., in the 328th Judicial District Court of Fort Bend County, Texas.[2] In this

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[2] The conversion claims were originally filed in the Izens' divorce case and were later severed into the separate state court suit cited above. This court's references to the "state court conversion action" include the originally filed conversion claims and the subsequently raised claim for wrongful interference with the funds in the Fort Bend County court

suit Joe Izen, Jr. alleged that he was a limited partner of Conroe Office Building, Ltd. and had control, in a fiduciary capacity, over the bank account from which Martha Mackin Izen withdrew funds. (Bankruptcy Court's Memorandum Opinion at 3) Joe Izen, Jr. also alleged that he had made numerous verbal demands on Martha Mackin Izen and her attorneys, Cole, Nichols and Nichols, P.C., "for return of the Partnership funds -- all to no avail." Izen alleged that John Nichols was aware of the alleged conversion at least by March 17, 1987, but that Nichols still refused to turn over the funds. (Bankruptcy Court's Memorandum Opinion at 2-3) Conroe Office Building, Ltd. intervened in the suit and named Martha Mackin Izen, John Nichols, Joe Izen, Jr. and others as defendants and alleged that all defendants except Joe Izen, Jr. had converted its funds. (Bankruptcy Court's Memorandum Opinion at 4)

On December 11, 1987, nine days after the Fort Bend County conversion action was filed, John Nichols and Deana Counts Nichols filed a voluntary petition under Chapter 7 of the Bankruptcy Code. The Nichols listed Joe Izen, Jr. as a creditor on their original bankruptcy schedules and statements filed on January 24, 1988. The claim was characterized as disputed and the amount unknown. Conroe Office Building, Ltd. was later listed as a creditor on the debtors' amended schedules and statements filed on May 9, 1989. This claim was described as disputed and contingent. (Bankruptcy Court's Memorandum Opinion at 4-5) The first meeting of creditors was set for February 19, 1988, fixing April 19, 1988, as the last date for filing objections to the Nichols' discharge or complaints to determine the dischargeability of a debt. (Bankruptcy Court's Memorandum Opinion at 5)

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registry regardless of the state court cause number in which these claims were first made.

On January 19, 1988, Joe Izen, Jr. filed a motion for relief from the automatic stay seeking the bankruptcy court's permission to continue prosecution of the Fort Bend County conversion action against John Nichols. Conroe Office Building, Ltd. filed a similar motion on January 25, 1988. The bankruptcy court granted the motion and lifted the automatic stay to allow prosecution of the Fort Bend County conversion action. (Bankruptcy Court's Memorandum Opinion at 5-6) No objection to the Nichols' discharge was filed by Joe Izen, Jr. or Conroe Office Building, Ltd., and the Nichols were discharged from bankruptcy on May 4, 1988. Although Joe Izen, Jr. and Conroe Office Building, Ltd. were aware of the Nichols' bankruptcy discharge, they continued to prosecute the Fort Bend County conversion action. (Bankruptcy Court's Memorandum Opinion at 6) At some point, Martha Mackin Izen paid approximately $18,000 of the funds she had allegedly removed from the Conroe Office Building, Ltd. account into the registry of the court in Fort Bend County pursuant to an order of that court. (Statement of Facts of June 29, 1992, Bankruptcy Court hearing at pp. 144-146; Appellants' Exhibit 1, Fort Bend County Court Docket Sheet in No. 59,359; Appellants' Brief at 8) Thereafter, on May 3, 1988, John Nichols, Warren Cole and John F. Nichols & Assoc. P.C. objected to the withdrawal of those funds. (Appellants' Exhibit 3)

On April 11, 1990, Martha Mackin Izen filed a cross-claim in the Fort Bend County conversion action against John Nichols for legal malpractice arising out of his representation of her in her divorce and alienation of affection suit against Joe Izen, Jr. (Bankruptcy Court's Memorandum Opinion at 6) (John Nichols had continued to represent Martha Mackin Izen in her divorce action until April 11, 1988, when the court disqualified him because of a conflict of interest. (Statement of Facts of June 29, 1992, Bankruptcy Court hearing at p. 10) On April 10, 1990, one day before Martha

Mackin Izen filed her cross-claim, Joe Izen, Jr. and Martha Mackin Izen executed a settlement agreement pursuant to which Martha Mackin Izen assigned to Joe Izen, Jr. 50% of her legal malpractice claims against John Nichols. Joe Izen, Jr. later substituted as the real party in interest and adopted Martha Mackin Izen's malpractice pleadings as his own. (Bankruptcy Court's Memorandum Opinion at 6-7)[3] The Izens' alleged that John Nichols was guilty of legal malpractice because:

(1) Nichols caused Martha Izen to be sanctioned on April 28, 1987, in her divorce action for failure to appear at a deposition;

(2) Nichols had a conflict of interest with respect to the disputed Conroe funds because he had received a portion of them;

(3) a conflict of interest existed between Nichols and his client Martha Mackin Izen because they were both defendants in the Fort Bend County conversion action (Bankruptcy Court's Memorandum Opinion at 7); and

(4) Nichols opposed the withdrawal of the funds from the court registry without the advice and consent of Martha Mackin Izen and without disclosing his conflict of interest to her. (Nichols' Exhibit 18, Martha Mackin's Original Cross-Claim at 4-5)

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[3] According to appellants, Martha Mackin Izen later settled her 50% unassigned interest in the claim against John Nichols for $15,000. (Appellants' Brief at 17).

There has been no final determination by the district court of Fort Bend County on the merits of the conversion or malpractice claims, or on the merits of John Nichols' affirmative defense of discharge in bankruptcy. (Bankruptcy Court's Memorandum Opinion at 7) However, the state court denied John Nichols' motion for summary judgment, which relied on the affirmative defense of discharge in bankruptcy.

III. Reopening of the Bankruptcy

On March 7, 1991, following the filing of the legal malpractice cross-claim and the denial of John Nichols' summary judgment motion in the Fort Bend County suit, the Nichols filed a motion to reopen their bankruptcy. (Bankruptcy No. 87-11516, Docket Entry No. 43) Their discharge in bankruptcy had occurred almost three years before, on May 4, 1988. The bankruptcy court, Judge Karen R. Brown, denied the Nichols' motion without hearing. (Bankruptcy No. 87-11516, Docket No. 51) The Nichols moved for reconsideration. (Bankruptcy No. 87-11516, Docket Entry No. 53) Before the motion for reconsideration could be ruled on, Judge Brown set aside her prior order and recused herself. (Bankruptcy No. 87-11516, Docket Entry No. 55) The case was reassigned to Judge Manuel Leal. (Bankruptcy No. 87-11516, Docket Entry No. 56)

On October 22, 1991, the bankruptcy court reopened the Nichols Chapter 7 bankruptcy. (Bankruptcy No. 87-11516, Docket Entry No. 68) On August 21, 1992, after an evidentiary hearing, the court found that the conversion cause of action filed by Izen and Conroe Office Building, Ltd. and the Izens' malpractice cross-claim were prepetition claims that had been discharged. (Bankruptcy Court's Memorandum Opinion at 9, 10, and 12) The court enjoined appellants "from further pursuing any means of holding John Floyd

Nichols or his wife, Deana Counts Nichols, personally liable for the claims constituting Cause No. 59,359 now pending in the 328th Judicial District Court of Fort Bend County, Texas, including the claim for conversion and the claim of legal malpractice based on debtor John Floyd Nichols' prepetition acts." (Bankruptcy Court's Memorandum Opinion at 14-15) Appellants' motion for new trial was denied. (Bankruptcy No. 87-11516, Docket Entry No. 115) Appellants moved to modify the injunction to allow them to continue with the Fort Bend County lawsuit against the Nichols' insurance carrier. (Bankruptcy No. 87-11516, Docket Entry No. 108) The motion to modify the injunction was also denied. (Bankruptcy No. 87-11516, Docket Entry No. 119)

IV. The Bankruptcy Court's Decision to Reopen the Nichols Bankruptcy

Appellants argue that the bankruptcy court erred in reopening the Nichols' bankruptcy because of the length of time between the Nichols' bankruptcy discharge and the motion to reopen and because of the pending Fort Bend County lawsuit. They also argue that by participating in the Fort Bend County lawsuit the Nichols were barred from moving to reopen the bankruptcy. The decision to reopen a bankruptcy case lies within the sound discretion of the bankruptcy court when cause for reopening has been shown. Whether to exercise this discretion depends upon the circumstances of the individual case when viewed in accordance with the equitable nature of bankruptcy proceedings. In re Case, 937 F.2d 1014, 1018 (5th Cir. 1991) (citations omitted) (construing 11 U.S.C. § 350(b), which provides that 'a case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.'). This court's

review of the bankruptcy court's decision to reopen is governed by the abuse of discretion standard. In re Case, 937 F.2d at 1018.

The bankruptcy court held a hearing before granting the Nichols' motion to reopen the bankruptcy. Although the court did not make express findings of fact and conclusions of law on the issue of reopening the case, the hearing transcript reveals that the Nichols argued that their prior discharge rendered appellants' continued prosecution of the Fort Bend County lawsuit improper but that the Fort Bend County court had refused to grant the Nichols' motion for summary judgment based on the discharge. (Statement of Facts of October 22, 1991, Bankruptcy Court hearing on First Amended Motion to Reopen Case at pp. 7-9) The bankruptcy court held that based upon 11 U.S.C. § 350 and cases construing the statute it was proper to reopen the case. (Statement of Facts of October 22, 1991, Bankruptcy Court hearing on First Amended Motion to Reopen Case a pp. 21-23) The bankruptcy court further explained that reopening the case was a "ministerial act," which did not affect the pending Fort Bend County lawsuit. (Statement of Facts of October 22, 1991, Bankruptcy Court hearing on First Amended Motion to Reopen the Case at pp. 21-23)

A. Was the Nichols' Motion to Reopen the Bankruptcy timely and was it appropriate in light of the pending Fort Bend County lawsuit?

Although it is true that "[t]he longer the time between the closing of the estate and the motion to reopen, . . . the more compelling the reason for reopening the estate should be," In re Case, 937 F.2d at 118 (citation omitted),

appellants have cited no authority that would preclude reopening after approximately 41 months. This is not an inordinate length of time given the facts of this case.

Nor is the court persuaded that the pendency of the Fort Bend County lawsuit precluded the bankruptcy court's decision to reopen. The court recognizes that "[b]ankruptcy courts have refused to reopen a case for the purpose of considering the issue of dischargeability of a debt when a state court has concurrent jurisdiction." 2 Collier on Bankruptcy, § 350.03 p. 350-11 n.24 (citations omitted). Particularly where "leaving the entire matter with the state court would prevent piecemeal litigation and allow a state court proceeding which was prior in time to continue without federal interference" reopening is frowned upon. See In re Foster, 38 B.R. 636, 639 (Bankr. D.Conn. 1984), citing Moses H. Cone Hospital v. Mercury Constr., 103 S.Ct. 927 (1983).

In this case, however, several unique circumstances were involved. First, issues such as nondischargeability because of fraud, embezzlement, or larceny (see infra at Part V)), which are within the exclusive jurisdiction of the bankruptcy court, were potentially involved in the state court suit, and the state court has not made a final decision on the merits of the dischargeability issue. Also, when the bankruptcy court lifted the stay to permit the Fort Bend County lawsuit to continue, the bankruptcy court stated that the "state court proceeding . . . seeks recovery of a prepetition claim 'against the debtor . . .'" (Order, Bankruptcy No. 87-11516, Docket Entry No. 29 at 3) The bankruptcy court further noted that the state court trial was set for the following week and its resolution of the conversion claim would "promote efficient administration of this estate." Id. at 5. The bankruptcy court also stressed that the stay was "modified only to the extent necessary to

allow judgment to be entered . . . and that the stay continued in effect as to the enforcement of any claim upon the debtor's estate." Id. at 6. Because the state court lawsuit was never tried, the court's stated purposes in lifting the stay were thwarted, and the debtors' were subsequently discharged without objection from the appellants. Under these facts the bankruptcy court did not abuse its discretion in reopening the Nichols' bankruptcy case in order to construe the parameters of its order granting discharge of the Nichols' debt. See, e.g., In re Shondel, 950 F.2d 1301, 1306 (7th Cir. 1991) (where the bankruptcy court has "special interest in the integrity of its own judgment, it deserves some leeway in reopening a case under such circumstances").

B. Were the Nichols Barred from Seeking the Reopening of their Bankruptcy Case?

Appellants argue that the Nichols were barred by laches, election of remedies, and collateral estoppel from seeking to reopen their bankruptcy case because of their participation as defendants in the Fort Bend County lawsuit. The court is not persuaded by these arguments. The Nichols have always asserted that any debts to appellants were prepetition, and they did not wait until after the resolution of the state court case to move to reopen, but promptly sought the bankruptcy court's relief when the state court declined to reorganize their bankruptcy discharge at the summary judgment stage. Furthermore, the denial of a motion for summary judgment has no collateral estoppel effect where, as here, it has not been incorporated in a final judgment. Under the facts of this case, neither laches, election of remedies, nor collateral estoppel barred the Nichols from seeking to reopen the bankruptcy case.

V. Are appellants' claims pre- or post-petition?

Appellants assert that the bankruptcy court erred in determining that all of their claims against the Nichols were prepetition and, therefore, discharged. "Generally, postpetition claims are not dischargeable in bankruptcy, and therefore, do not affect the estate." In re Wood, 825 F.2d 90, 94 (5th Cir. 1987). Appellants argue that their claims based on John Nichols' alleged conversion were not prepetition because Nichols allegedly continued in his refusal to turn over the funds he had received from Martha Mackin Izen after the filing of the bankruptcy petition. Intertwined with this argument is appellants' claim that John Nichols also wrongfully interfered (postpetition) with the funds while they were in the registry of the Fort Bend County court by objecting to the funds' dispersal. Joe Izen, Jr. also argues that his assigned legal malpractice claims were not prepetition because they did not accrue until John Nichols ceased his representation of Martha Mackin Izen on April 11, 1988.

A. Conversion Claims

The court is not persuaded by appellants' arguments about the postpetition nature of their conversion claims. After an evidentiary hearing, the bankruptcy court made a factual determination that the "acts giving rise to the allegations of conversion by Martha Mackin Izen and John Nichols occurred on February 18, 1987, prior to the filing of Mr. Nichols' bankruptcy petition." (Bankruptcy Court's Memorandum Opinion at 9) The bankruptcy court's factual determinations regarding when the alleged conversion occurred are not clearly erroneous and will not be disturbed. Nor did the bankruptcy court incorrectly apply Texas law when it determined that "[u]nder Texas law a conversion

occurs when a person unlawfully and wrongfully exercises dominion and control of the property of another to the exclusion or defiance of the right of possession of the true owner or person entitled to be in possession of the property." (Bankruptcy Court's Memorandum Opinion at 9) It is true, as appellants urge, that under Texas law " [w]hen possession of property is lawful at the outset, as it was here, conversion occurs when the possessor refuses the owner's demand for return of the property." Snell v. Short, 544 F.2d 1289, 1291 (5th Cir. 1977). But there was evidence that appellants demanded that Nichols return the funds before he filed for bankruptcy and that Nichols refused to do so. The bankruptcy court could thus have believed that Nichols' refusal to return the funds also occurred prepetition, not, as appellants argued, when he filed his answer in the state court conversion action.

Furthermore, even if appellants' conversion claims did not accrue until John Nichols asserted his qualified good faith refusal to turn over the funds, claims in bankruptcy are "broadly defined and construed." (Bankruptcy Court's Memorandum Opinion at 8, citing In re Cohen, 875 F.2d 508 (5th Cir. 1989)). "Bankruptcy courts have held that a cause of action under state law constitutes a claim in bankruptcy despite the fact that it was not cognizable until after the bankruptcy petition was filed." (Bankruptcy Court's Memorandum Opinion at 9, citing In re Johns-Manville Corp., 57 B.R. 680 (Bankr. S.D.N.Y. 1986)) Because the "triggering act constituting the basis for the cause of action occurred prior to the date the bankruptcy petition was filed" (Bankruptcy Court's Memorandum Opinion at 9, citing In re Grynberg, 113 B.R. 709, 713 (Bankr. D. Colo. 1990)), the bankruptcy court did not err in finding that appellants' conversion claims arose prepetition.

Appellants also argue that the converted funds Nichols received from Martha Mackin Izen never became part of the Nichols' bankruptcy estate because Martha Mackin Izen could not pass title to these funds, and therefore that any claims to these funds were not dischargeable. Whether debts are nondischargeable because of circumstances such as fraud, embezzlement, wrongful abrogations of fiduciary duty, or willful or malicious injury to property are issues within the exclusive jurisdiction of the bankruptcy court that should be raised prior to discharge. See 11 U.S.C. §§ 523(a)(2), (a)(3)(B), (a)(4), (a)(6), and (c)(1). Even potentially nondischargeable debts can be discharged when not objected to prior to discharge if a "creditor had notice or actual knowledge of the case in time for such timely filing and request." Id. The bankruptcy court held that appellants did not timely raise their argument of nondischargeability, and thus were barred from raising their dischargeability argument. (Bankruptcy Court's Memorandum Opinion at 11-12) Appellants do not refute that they failed to timely raise their dischargeability argument, nor do they offer any explanation for their failure. The court is thus not persuaded by appellants' arguments on this issue.

B. Malpractice Claims

The bankruptcy court's determination that the legal malpractice claims arose prepetition is more troublesome. After hearing the evidence, the bankruptcy court found that "[u]nder the facts of this case Martha Izen's cause of action for legal malpractice by her attorney John Nichols arose from prepetition acts of the debtor. Therefore, under Texas law Martha Mackin Izen's right to payment accrued prior to the time that Nichols filed her bankruptcy." (Bankruptcy Court's Memorandum Opinion at 10) Appellants argue that this finding is erroneous because the malpractice claims could not have accrued before John Nichols ended his representation of

Martha Mackin Izen in the Fort Bend County lawsuit and because some acts of Nichols on which the malpractice claims are based occurred postpetition.

The bankruptcy court could have found that Martha Mackin Izen knew of Nichols' interest in the allegedly converted funds when she gave them to him, or shortly thereafter when Joe Izen, Jr. and Conroe Office Building, Ltd. demanded that Nichols return the funds. These acts occurred prepetition. The bankruptcy court could also have determined that any conflict between Martha Mackin Izen and Nichols concerning the allegedly converted funds was known to her prepetition because of Nichols' receipt of the allegedly converted funds. As to the malpractice claims premised upon Nichols' receipt of the funds and their status as codefendants in the conversion action, at least some conduct of Nichols on which these claims are predicated occurred prepetition, as did Nichols' allegedly negligent conduct in allowing Martha Mackin Izen to be sanctioned in the divorce case on April 28, 1987.

However, the bankruptcy court's opinion does not address appellants' allegation that John Nichols committed a postpetition act of malpractice when he opposed the withdrawal of the funds from the court registry without the advice and consent of Martha Mackin Izen and without disclosing his conflict of interest to her. Accordingly, this issue must be remanded to the bankruptcy court for a determination whether this act constitutes a postpetition ground for malpractice and if so, whether it was discharged.

Appellants also argue that the malpractice claims arising out of prepetition acts of the debtor were tolled while John Nichols continued to represent Martha Mackin Izen and thus could not be discharged in bankruptcy. Under Texas law a cause of action for legal malpractice accrues when the

client sustains a legal injury or when the client should have discovered the facts of the injury. See, e.g., Hughes v. Mahoney & Higgins, 821 S.W.2d 154 (Tex. 1991). However, "when a client's cause of action of malpractice arises during the attorney's prosecution or defense of a claim which results in litigation . ...{l}imitations are tolled for the second cause of action. Id. at 157. It is undisputed that John Nichols continued to represent Martha Mackin Izen in her divorce action until April 11, 1988, when he was disqualified. The statute of limitations was therefore tolled until April 11, 1988. However, this fact is not dispositive of the discharge issue. As noted above in the court's discussion of conversion, claims are construed broadly in bankruptcy. Even unmatured, undiscovered, and contingent claims are included in the Bankruptcy Code's provisions for claim. 11 U.S.C. § 101(5) (A) and (B). See also In re Pettibone Corp., 90 B.R. 918, 925 (Bankr. N. D. Ill. 1988). Because Martha Mackin Izen's malpractice claims arose prepetition, they were dischargeable even though they were tolled for purposes of state law limitations. See In re Pettibone Corp., 90 B.R. at 926 ("Outside the mass torts context, the majority rule is that a claim arises at the time when acts were performed against the injured party that gave rise to the liability.").[4]

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[4] Appellants cite In re Frenville Co., Inc., 744 F.2d 332 (3d Cir. 1984), cert. denied, 105 S.Ct. 911 (1985), for the proposition that bankruptcy courts must look to state law to determine when a claim arises in bankruptcy. Other circuits that have considered this issue have declined to follow Frenville. See, e.g., Grady v. A.H. Robins Co., Inc., 839 F.2d 198, 201 (4th Cir.), cert. dism'd, 109 S.Ct. 201 (1988); In re Hemingway Transport, Inc., 954 F.2d 1, 8-9 n.9 (1st Cir. 1992). In addition, bankruptcy courts in the Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have questioned the Frenville court's reasoning in light of the definition of "claim" in the code. Under the facts of this case, the court declines to follow Frenville.

Although the bankruptcy court correctly held that the malpractice claims based upon prepetition acts were dischargeable, that does not necessarily mean that they were actually discharged. The record reflects that Martha Mackin Izen was never listed as a creditor in the Nichols bankruptcy, nor were any of the unmatured malpractice debts listed. In general, debts that are neither listed nor scheduled are exceptions to the debtor's discharge unless the creditor "had notice or actual knowledge of the case in time for such timely filing and request." 11 U.S.C. § 523 (a)(3)(A) and (B). The bankruptcy court's opinion does not state whether Martha Mackin Izen had notice or actual knowledge of the Nichols' bankruptcy in time for her claims to be discharged, and the parties dispute this fact. (Compare Debtors' Motion to Reopen, Bankruptcy No. 87-11516-H5-7, Docket Entry No. 43 at 9 with Response and Objection of Martha Mackin Izen, Bankruptcy No. 87-11516-H5-7 at 4.) Accordingly, this issue must be remanded to the bankruptcy court for its determination.

C. Wrongful Interference Claim

Appellants' argument that John Nichols wrongfully interfered with the funds of Conroe Office Building, Ltd. while the funds were in the registry of the Fort Bend County court does not appear to have been addressed by the bankruptcy court. Furthermore, the scant attention to this claim in the parties' briefs prevents this court from determining whether this claim was pre- or post-petition. This issue must be remanded to the bankruptcy court for a determination whether this claim constitutes an independent postpetition cause of action or whether it was also discharged.

VI. The Bankruptcy Court's Refusal to Modify its Injunction

Appellants argue that the bankruptcy court erred in refusing to modify its injunction to permit appellants to pursue John Nichols' liability insurance carrier in the Fort Bend County lawsuit. The bankruptcy court denied appellants' motion without explanation (Bankruptcy No. 87-11516, Docket Entry No. 119), even though appellants had stipulated to limit their potential recovery against the Nichols to the proceeds of Nichols' insurance policy. (Bankruptcy No. 87-11516, Docket Entry No. 104)

Ordinarily a discharge is not intended to accrue to the benefit of third parties who may have liability based on a bankrupt debtor's liability. In re Mann, 58 B.R. 953, 956 (Bankr. W.D. Va. 1986). Thus, courts usually permit actions against the debtor to establish the liability of the debtor's insurers since they do not prevent the debtor's fresh start. See, e.g., Matter of Shondel, 950 F.2d 1301, 1306-1308 (7th Cir. 1991) (["A] discharge injunction under section 524 does not preclude the determination of a debtor's liability for the purpose of recovery from an insurer . . . . The lower courts that have considered this issue . . . have agreed with our conclusion, apparently without exception."); In re Jet Florida systems, Inc., 883 F.2d 970 (11th Cir. 1989); In re Western Real Estate Fund, Inc., 922 F.2d 592, 600-601 (10th Cir. 1990)' In re Pappas, 106 B.R. 268, 271 (D. Wyo. 1989); In re Greenway, 126 B.R. 253, 254-255 (Bankr. E.D. Tex. 1991).

The Nichols argue that appellants should not be permitted to proceed against them to establish the liability of the Nichols' insurer because of appellants' delay in limiting their claim to one for insurance proceeds only. However, like the creditors in In re Walker, 927 F.2d 1138, 1143 (10th

Cir. 1991), appellants appear to have moved promptly to modify the injunction as soon as they lost their discharge argument in bankruptcy court. Until then they had no need for modification. The Nichols also argue that appellants' belated decision to pursue John Nichols in state court to collect from his insurance carrier is part of a continuing campaign of bad faith litigation tactics against the Nicols. Although these fact, if found by the bankruptcy court, may have justified the court's decision not to modify its injunction, this court has no way of divining such reasoning from the bankruptcy court's order. Lastly, the Nichols argue that cost to them of the continuing state court lawsuit justifies the denial of the modification of the injunction. However, possible legal costs to the debtor are generally not a basis for prohibiting a creditor from seeking a modification of a discharge injunction. See, e.g., In re Walker, 927 F.2d at 1143-1144, citing In re Jet Florida Systems, 883 F.2d 970, 976 (11th Cir. 1989).

Because the bankruptcy court did not give reasons for its refusal to modify its injunction, this court cannot determine why the bankruptcy court chose not to follow the usual rule permitting creditors to pursue a debtor's insurer. This issue must therefore be remanded to the bankruptcy court for additional findings of fact and conclusions of law.

VII. The Bankruptcy Court's Denial of Appellants' Motion for New Trial

Appellants argue that the bankruptcy court should have granted them a new trial on the issue of dischargeability and modification of the court's injunction based on the alleged errors discussed above. To the extent that this court has affirmed the bankruptcy court, its decision to grant a new

trial was not an abuse of discretion. To the extent that the court has remanded issues for further consideration, the issue is moot.

XIII. Judge Brown's Recusal

Completely apart from the merits of their appeal, appellants argue that Judge Karen Brown should be forced to state on the record her reasons for recusal. Appellants use unsupported innuendo to wage an attack on the integrity of the bankruptcy court simply because a judge who preliminarily ruled in their favor later recused herself, and the subsequently assigned judge ruled against them. Appellants' failure to cite any authority for this argument is not surprising since neither 28 U.S.C. § 455(a) nor § 455(b) requires the judge to state her reasons for recusal.

IX. Conclusion

This case will be remanded to the bankruptcy court for findings of fact and conclusions of law on the issues of:

(1) whether John Nichols' objection to the withdrawal of the converted funds in the registry of the Fort Bend County court, allegedly filed without the advice and consent of his client, Martha Mackin Izen, and in conflict with her interests, was a postpetition act of malpractice, and, if so, whether it can be discharged;

(2) whether Martha Mackin Izen had sufficient notice or knowledge of the Nichols' bankruptcy to permit discharge of her malpractice claims;

(3) whether John Nichols' alleged wrongful interference with the converted funds in the registry of the Fort Bend County court was a postpetition independent tort against the appellants, and, if so, whether it can be discharged; and

(4) why the bankruptcy court refused to modify its discharge order to permit the appellants to pursue the Nichols' insurer.

The bankruptcy court's decision will be affirmed in all other respects.

SIGNED at Houston, Texas, this 16th day of April, 1993.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX D

RECEIVED AUG 24 1992
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
AUG 21 1992
Michael N. Milby, Clerk
By Deputy: /s/ illegible

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	CASE NO.
JOHN FLOYD NICHOLS and	§	87-11516-H1-7
DEENA COUNTS NICHOLS,	§	
Debtors	§	

JUDGMENT

In accordance with this Court's findings and conclusions in the accompanying Memorandum Opinion of even date, the Court grants Debtors' Motion to Hold Joe Alfred Izen, Jr., Conroe Office Building, Ltd. and L.T. Bradtin Civil Contempt as follows: Joe Alfred Izen, L.T. Bradt and Conroe Office Building, Ltd. are enjoined by operation of 11 U.S.C. § 525 from further pursuing any means of holding John Floyd Nichols or his wife, Deena Counts Nichols, personally liable for the claims constituting Cause No. 59,359 now pending in the 328th Judicial District Court of Fort Bend County, Texas, including the claim for conversion and the claim of legal malpractice based on debtor John Floyd Nichols' prepetition acts. Any continued

actions undertaken in contravention to the injunction of 11 U.S.C. § 524 will subject the parties to contempt and the imposition of sanctions.

Signed this 21st day of August, 1992.

/s/ Manuel D. Leal
MANUEL D. LEAL
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E

RECEIVED AUG 21 1992
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
AUG 21 1992
Michael N. Milby, Clerk
By Deputy: /s/ illegible

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
JOHN FLOYD NICHOLS and	§	CASE NO.
DEENA COUNTS NICHOLS,	§	87-11516-H1-7
Debtors	§	

MEMORANDUM OPINION

Before this Court is debtors' Motion to Hold Joe Alfred Izen, Jr., Conroe Office Building, Ltd. and L.T. Bradt in Civil Contempt, filed by debtors. This motion for contempt is about lawyers suing lawyers over litigation concerning former clients, ex-spouses and an alleged paramour. The debtors are attorney John Floyd Nichols and his wife Deena Counts Nichols who seek to hold attorneys Joe Alfred Izen Jr., L.T. Bradt and Conroe Office Building Ltd., a partnership, in contempt for continuing to prosecute certain contested claims in state court after debtors had received their chapter 7 discharge. Debtors contend that these claims were discharged through their bankruptcy. The Court rules that the state court claims were discharged in the

Nichols' bankruptcy and that respondents are enjoined from further litigating those claims by operation of 11 U.S.C. § 524.

To the extent that any findings of fact constitute conclusions of law, they are adopted as such. To the extent that any conclusions of constitute findings of fact, they are so adopted.

Findings of Fact

Conroe Office Building, Ltd., was a partnership in which Joe Izen was one of the partners. The partnership had only one asset, a building located across the street from the county courthouse in Conroe, Texas. The office building was eventually sold to Montgomery County in 1986. Attorney L.T. Bradt was also a partner of Conroe Office. L.T. Bradt represents Conroe in this proceeding and in the state court lawsuit between the same parties.

On February 18, 1987 while still married to attorney Joe Izen, Jr. Martha Izen withdrew $42,779.45 from Conroe Office Building, Ltd.'s bank account on which Ms. Izen was a signatory. Two days later Martha Izen paid attorney John Nichols $25,000 to represent her in a divorce action against her husband Joe Alfred Izen, Jr. Within a few days John Nichols filed suit for divorce on behalf of Martha Izen against her husband Joe Izen naming Karen Cooley as his paramour in the suit for alienation of affections. Apparently, this claim was later withdrawn.

On April 28, 1987, Conroe Office made a written demand that John Nichols return the funds withdrawn by Martha Izen. The letter demanded return of "all monies converted by Martha Ann Mackin Izen and John F. Nichols on or about February 18, 1987". Conroe Office expressly

took the position "that both Martha Ann Mackin Izen and John F. Nichols have converted funds belonging to the Partnership."

On December 2, 1987, Joe Izen filed suit in state district court in Fort Bend County, Texas against John Nichols, Martha Izen and others for conversion. This case is currently pending as Cause No. 59,359, Joe Alfred Izen, Jr. vs. Conroe Office Building, Ltd. vs. John F. Nichols, et al, in the 328th Judicial District Court of Fort Bend County, Texas.

Joe Izen alleged in the Fort Bend County suit that he is a limited partner of Conroe Office and had control, in a fiduciary capacity, over the bank account from which Martha Izen withdrew funds. The petition also alleges that:

> On or about the 16th day of February, 1987, Martha Mackin Izen withdrew all the remaining funds in the partnership account and converted them to her own use and benefit.

... Thereafter Plaintiff [Joe Izen] made numerous verbal demands on Mackin and her divorce attorneys Cole, Nichols and Nichols, P.C. for return of the Partnership funds - all to no avail. Plaintiff then followed up these verbal demands with a letter demanding return of all partnership funds. Despite Defendants' receipt of this demand letter the Defendants, acting collectively, jointly, and severally refused to return the partnership funds but, instead, converted them to their own use.

Joe Izen's state court lawsuit sought recovery on two theories: theft and conversion. Joe Izen claimed that John Nichols was one of the persons who controlled the funds and would not turn them over. Joe Izen was aware of the alleged

conversion of funds from account #0017124, First City Bank - Fondren South by the various Defendants at least by March 17, 1987.

Conroe Office intervened in the Fort Bend County suit naming Martha Izen, John Nichols, Joe Izen and others as defendants. Conroe Office alleged that "all of the Defendants named in this petition, with the exception of Joe Alfred Izen, Jr., have converted Petitioner's funds and monies." Conroe's request to intervene was filed on December 8, 1987 and is currently pending in the state court. The state court defendants denied conversion and raised defenses.

On December 11, 1987 John Nichols and Deena Counts Nichols filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code. The conversion claims by Joe Izen and Conroe office against John Nichols were on file prior to John Nichols filing for bankruptcy.

Debtors listed Joe Izen, Jr. as a creditor on their original bankruptcy schedules and statements filed January 24, 1988. The claim was characterized as disputed and of an unknown amount. Conroe Office was later listed as a creditor on the Debtors' amended schedules and statements filed May 9, 1989 with the bankruptcy court. The claim was described as disputed and contingent.

Both Joe Izen and Conroe Office later amended their petitions against John Nichols in the Fort Bend County suits. Neither the original nor amended state court petitions allege any post-petition acts of conversion by John Nichols. Paragraph 6 of Conroe's First Amended Petition in Intervention does not allege a cause of action against John Nichols based on tortious interference with contract.

The Debtor's first meeting of creditors was set for February 19, 1988, fixing April 19, 1988 as the last date for filing objections to the Debtors' discharge or complaints to determine the dischargeability of a debt.

Meanwhile Joe Izen filed a Motion for Relief from the Automatic Stay on January 19, 1988, seeking this Court's permission to continue prosecution of his state court suit against John Nichols. Conroe Office filed a similar motion on January 25, 1988. Neither motion alleged any post-petition acts of conversion by John Nichols. At the hearing on the motions, Joe Izen stated that there had been a conversion by John Nichols and that relief from the stay was needed to pursue that cause of action. The bankruptcy court lifted the automatic stay to allow prosecution of the state court suit.

No objection to the Debtors' discharge or complaint to determine the dischargeability of a debt was ever filed by Joe Izen Jr. or Conroe Office. The debtors were discharged in bankruptcy on May 4, 1988. Joe Izen and Conroe were aware that John Nichols had been given a bankruptcy discharge. However, Joe Izen Jr., L.T. Bradt and Conroe Office continued prosecuting the state district court case against debtors in spite of the Nichols' bankruptcy discharge.

On April 11, 1990, a crossclaim for legal malpractice was filed in the name of Martha Izen against John Nichols in the state court suit seeking recovery on theories of negligence, breach of the duty of good faith and fair dealing, breach of fiduciary duty, fraud, violation of the Texas Deceptive Trade practices Act, breach of contract and contribution and indemnity.

Prior to debtors' receiving their discharge Joe Izen Jr. and Martha Izen executed a settlement agreement where

Martha Izen assigned to Joe Izen Jr. 50% of her legal malpractice case against John Nichols. Later Joe Izen substituted as the real party in interest and adopted Martha Izen's pleadings as his own.

The legal malpractice crossclaim arises out of Mr. Nichols' handling the alienation of affection suit against Karen Cooley, the imposition of sanctions on April 28, 1987 against Martha Izen for failure to appear at a deposition, allegations that John Nichols had a conflict of interest with respect to the disputed Conroe funds because he "had received a portion of the funds" taken from the Conroe account, and because Nichols and his client Martha Izen were both defendants in the Fort Bend County suit. The crossclaim alleges no post-petition acts by John Nichols for which recovery is sought.

There has been no determination by the state district court in Fort Bend County on the merits of the conversion or malpractice claims, or on the merits of John Nichols' affirmative defense of discharge in bankruptcy. Joe Izen Jr., L.T. Bradt and Conroe Office claim that the conversion is a continuing one because debtors have not returned the funds. Therefore, they claim that the conversion is occurring post petition and thus is not a dischargeable claim.

Conclusions of Law

A claim is specifically defined in the Bankruptcy Code as:

> (A) [a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

> (B) [b] right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

A creditor is an entity that has a claim against the debtor that arose at the time of or before the order for relief. 11 U.S.C. § 101(10). A debt is defined simply as a liability on a claim. 11 U.S.C. § 101(12).

A claim is broadly defined and construed. In re Cohen, 875 F.2d 508 (5th Cir. 1989). For instance, a claim has been interpreted to include debts that do not otherwise arise from a breach of contractual duties as would normally engender a debtor-creditor relationship. See Ohio v. Kovacs, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985)' Penn. Dept. of Public Welfare v. Davenport 495 U.S. ---, 110 S.Ct. 2126, 109 L.Ed.2d 583 (1990). Bankruptcy courts have held that a cause of action under state law constitutes a claim in bankruptcy despite the fact that it was not cognizable until after the bankruptcy petition was filed. In re Johns-Manville Corp., 57 B.R. 680 (Bankr. S.D.N.Y. 1986). The litmus test is that the triggering act constituting the basis for the cause of action occur prior to the date the bankruptcy petition was filed. In re Grynberg, 113 B.R. 709, 713 (Bankr. D. Colo. 1990), citing Grady v. A.H. Robins, 839 F.2d 198, 202-03 (4th Cir. 1988). This reasoning comports with the legislative intent that even "contingent" and "unmatured" claims be addressed in a particular bankruptcy case and be made subject to the reach of the § 727 discharge and the fresh start goals that underlie the bankruptcy laws. Grynberg at 712.

Under Texas Law a conversion occurs when a person unlawfully and wrongfully exercises dominion and control of the property of another to the exclusion or defiance of the right of possession of the true owner or person entitled to be in possession of the property. Bishop v. Geno Designs Inc., 631 S.W.2d 581 (Tex. App. - Tyler 1982, no writ); McVea v. Verkins, 587 S.W.2d 526 (Tex. Civ. App. - Corpus Christi 1979, no writ). The acts giving rise to the allegations of conversion by Martha Mackin Izen and John Nichols occurred on February 18, 1987, prior to the filing of Mr. Nichols' bankruptcy petition.

Under the facts of this case Martha Izen's cause of action for legal malpractice by her attorney John Nichols arose from prepetition acts of the debtor. Therefore, under Texas law, Martha Izen's right to payment accrued prior to the time that Nichols filed for bankruptcy.

An order of discharge in a Chapter 7 bankruptcy case relieves the debtor from liability for all debts that arose before the petition date, and from any liability on a claim allowed under § 502. 11 U.S.C. § 727(b). All debts are dischargeable in bankruptcy unless specifically excepted by provisions of the United States Bankruptcy Code. Matter of Ethridge, 80 Bankr. 581 (Bankr. M.D. Ga. 1987). Exceptions to discharge are recognized for those debts that arise from certain debtor acts as specified in 11 U.S.C. § 523. Among the kinds of debt so excepted are those arising from debtor fraud, wrongful abrogations of fiduciary duty or willful or malicious injury to property. See 11 U.S.C. § 523(a)(2), (a)(4) and (a)(6). In order for debts to be deemed nondischargeable under one of the named exceptions, an adversary proceeding must be initiated by the holder of the claim. 11 U.S.C. § 523(c); B.R. 7001. The time period for bringing such an action is strictly defined in B.R. 4007(c).

That Rule states:

> A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

A similarly worded provision in B.R. 4004(a) governs the time period for filing an objection to a debtor's discharge under § 727(a).

The conversion claims asserted by Joe Izen and Conroe against John Nichols constitute a claim of the type defined under 11 U.S.C. § 523(a)(6). Bankruptcy Rule 4007(c) permitted Joe Izen and Conroe to file a complaint to determine the dischargeability of a debt within sixty days following the first date set for the meeting of creditors, otherwise being April 19, 1988. Bankr. R. Proc. 4007(c).

The Rules allow for an extension of time to bring dischargeability actions under § 523 or § 727 upon proper and timely application and a showing of cause for the extension. See B. Rules 4004(b) and 4007(c). A timely application is one filed within the original 60 day time period defined in those Rules and as fixed by the Court. Dischargeability complaints brought after that period are subject to dismissal as being time barred. A creditor who has knowledge of the bankruptcy has the burden to ascertain

the deadline for objecting to a debtor's discharge or to the dischargeability of a particular debt. In re Compton, 891 F.2d 1180 (5th Cir. 1990).

The motions for relief from stay filed by Joe Izen and Conroe did not constitute complaints to bar the dischargeability of particular debts under Section 523 for the purpose of otherwise timely complying with Bankruptcy rule 4007(c). Matter of McGuirt, 879 F.2d 182 (5th Cir. 1989).

The claims asserted against John Nichols by Joe Izen and Conroe in the Fort Bend County Suit were discharged on May 4, 1988. The claim asserted against John Nichols for legal malpractice was likewise discharged on May 4, 1988.

A debtor's discharge, once obtained, is protected by the injunctive provisions contained in 11 U.S.C. § 524. That section states:

> (a) A discharge in a case under this title--
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

Any action initiated against the debtor to collect or reduce to judgment a liability on a claim discharged by operation of § 727 is void ab initio.

The failure of Joe Izen and Conroe Office to object to the dischargeability of any particular debt or to John Nichols' discharge in general precludes them from attempting to obtain a personal judgment against John Nichols directly or derivatively of any claim against his professional corporation.

John Nichols' Chapter 7 discharge operates as a injunction against the continuation of the state court suit, or any suit initiated as a result of he same facts, against John Nichols for the purpose of collecting, recovering or offsetting the claims raised in the state court suit as a personal liability of John Nichols. 11 U.S.C. § § 524(a), 727; In re Bouchelle, 98 Bankr. 81 (Bankr. M.D. Fla. 1989).

Joe Izen's and Conroe's continued prosecution of either of the two subject state court lawsuits violates the permanent injunction granted to John Nichols pursuant to 11 U.S.C. § 524.

Joe Izen's and Conroe's knowledge of John Nichols' bankruptcy case, their pre-petition filing of the conversion suit against John Nichols, and their refusal to heed demands from John Nichols concerning their incessant violations of the discharge injunction, support the conclusion that Joe Izen and Conroe willfully violated John Nichols' discharge injunction.

L.T. Bradt as attorney for Conroe, willfully violated John Nichols' discharge injunction because of his prior knowledge of John Nichols' bankruptcy, the subject matter of the state court suit and his failure to cease prosecution of the same after John Nichols' repeated attempts to maintain

the integrity of his discharge injunction. Matter of Miller, 81 Bankr. 669 (Bankr. M.D. Fla. 1988); In re Miller, 89 Bankr. 942 (Bankr. M.D. Fla. 1988).

Joe Alfred Izen, L.T. Bradt, and Conroe Office Building, Ltd. are enjoined by operation of 11 U.S.C. § 524 from further pursuing any and all means of holding John Floyd Nichols or his wife, Deena Counts Nichols, personally liable for the claims constituting Cause No. 59,359 now pending in the 328th Judicial District Court of Fort Bend County, Texas, including the claim for conversion and the claim of legal malpractice based on debtor John Floyd Nichols' prepetition acts. Any continued actions undertaken in contravention to the injunction of 11 U.S.C. § 524 will subject the parties to contempt and the imposition of sanctions.

A separate judgment will issue.

Signed this 21st day of August, 1992.

/s/ Manuel D. Leal
MANUEL D. LEAL
UNITED STATES BANKRUPTCY JUDGE

No. 94-380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOE ALFRED IZEN, JR., CONROE OFFICE BUILDING, LTD., AND L.T. BRADT,
Petitioners,
v.
JOHN FLOYD NICHOLS and DEENA COUNTS NICHOLS,
Respondents.

Petition for Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

John Floyd Nichols and Deena Counts Nichols, Respondents herein, filed bankruptcy on December 11, 1987, under Chapter 7 of the United States Bankruptcy Code. On May 4, 1988, the Nichols were discharged from bankruptcy. Joe Alfred Izen, Jr., L. T. Bradt and Conroe Office Building, Ltd., Petitioners herein, did not file a complaint challenging the dischargeability of their claim against the Nichols. Consequently, Petitioners' pre-petition claims against the Nichols, if any, were discharged. Thereafter, on April 11, 1990, Martha Mackin Izen, former wife of Joe Alfred Izen, Jr., filed a legal malpractice cross-

claim[1] against John Nichols, her divorce attorney. Prior to the filing of the cross-claim, Martha Izen assigned 50% of her legal malpractice case against Nichols to Joe Izen. Subsequently, Martha Izen settled her claims and dismissed her malpractice case. The only remaining legal malpractice claims against Nichols are asserted by Izen pursuant to his assignment from Martha Izen.

On August 21, 1992, the Honorable Manuel D. Leal, United States Bankruptcy Judge for the Southern District of Texas, entered a Memorandum Opinion and Judgment wherein the bankruptcy court explained that 11 U.S.C. § 524 of the United States Bankruptcy Code bars prosecution of pre-petition claims against the Nichols and that the claims made by the Petitioners arose prior to the filing of the Nichols' bankruptcy and, therefore, were barred from further prosecution. Judge Leal then concluded that if Petitioners persisted in pursuing the Nichols, then sanctions may be in order. Petitioners refused to be dissuaded by the statutory bar to the continuation of their lawsuit, and appealed the bankruptcy court's judgment to the Honorable Sim Lake, United States District Court Judge for the Southern District of Texas, Houston Division. Judge Lake remanded the matter back to Judge Leal for significant further findings of fact, which could, and in all likelihood will, entail additional evidentiary hearings to determine the unresolved issues. Petitioners then proceeded to attempt to appeal the remand order of Judge Lake to the Fifth Circuit Court of Appeals. However, the Fifth Circuit Court of Appeals refused to

---

[1] Petitioners had filed a State court lawsuit against John Nichols and Martha Izen for conversion of monies which allegedly belonged to Conroe Office Building, Ltd. The details of the trials and tribulations of the instant parties are eloquently set forth in the district court's Memorandum and Order attached as Appendix "C" to the Petition for Writ of Certiorari which is incorporated by reference herein.

entertain the appeal because the court concluded it lacked jurisdiction. *In re Nichols*, 21 F.3d 690 (5th Cir. 1994).

SUMMARY OF THE ARGUMENT

Despite Petitioners' pleas and protestations to the contrary, the Fifth Circuit Court of Appeals' dismissal for lack of jurisdiction is consistent with *Connecticut National Bank v. Germain*[2]. In an attempt to cover all possible bases, the Petitioners alternatively contend that "the Fifth Circuit refused to recognize that the District Court's order 'continued' the Bankruptcy Court's previous injunction for purposes of Section 1292(a)(1)," and then later assert that "[District] Judge Lake's Order is either final or Interlocutory" and, therefore, "[t]he Court of Appeals had jurisdiction in any event, whether under Section 1291 or Section 1292."

However, in the process of reaching its decision, the Fifth Circuit Court of Appeals *sua sponte* systematically evaluated all three grounds[3] for the Petitioners to invoke its jurisdiction and "conclude[d] that the district court's order remanding the case to the bankruptcy court was neither a final appealable order nor an appealable interlocutory order" which left the court without jurisdiction to entertain the Petitioners' premature appeal.

The reasoning of the court of appeals lacks the convolutions with which the Petitioners attempt to imbue it to create a conflict with *Germain*. Quite simply, the court of appeals determined that the district court's disposition of the Petitioners' appeal from the bankruptcy court was not a final

---

[2] 503 U.S. ____, 112 S.Ct. 1146 (1992).

[3] 28 U.S.C. §§ 158, 1291 and 1292.

order. The district court affirmed the bankruptcy court only to the extent of that which remained after four broad issues were remanded for further findings of fact and conclusions of law.[4] What remained after the remand, for the purpose of this Court's consideration, was simply the statutory injunction under 11 U.S.C. §524, to which all post-discharge bankrupts are entitled by law.

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[4] The district court's Final Judgment is attached as Appendix "B" to the Petition for Writ of Certiorari at pages 10a and 11a. For convenience, the four issues on remand to the bankruptcy court are:

(1) whether John Nichols' objection to the withdrawal of funds in the registry of the Fort Bend County court, allegedly filed without the advice and consent of his client, Martha Mackin Izen, and in conflict with her interest, was a post-petition act of malpractice, and, if so, whether it can be discharged;

(2) whether Martha Mackin Izen had sufficient notice or knowledge of the Nichols' bankruptcy to permit discharge of her malpractice claims;

(3) whether John Nichols' alleged wrongful interference with the converted funds in the registry of the Fort Bend County court was a post-petition independent tort against appellants, and, if so, whether it can be discharged; and

(4) why the bankruptcy court refused to modify its discharge order to permit the appellants to pursue Nichols' insurer.

ARGUMENT AND AUTHORITY

A. No Final Appealable Judgment

Both 28 U.S.C. §158(d) and 28 U.S.C. §1291 require a final judgment for purposes of review by the courts of appeal. In the case *sub judice*, as the court of appeals correctly concluded, there was no final judgment. The district court's order of remand requires extensive and significant further findings of fact and conclusions of law which are dispositive to the issues raised by Petitioners.

As the Fifth Circuit previously noted in *In re Bowman*, 821 F.2d 245 (5th Cir. 1987), a district court order which remands the case back to the bankruptcy court judge for significant further proceedings is not appealable under 28 U.S.C. §158(d). Other circuit courts have also reached the same conclusion, observing that "[a] remand for significant further proceedings includes one requiring de novo hearings [or] additional findings of fact concerning dispositive issues in the case [and, therefore,] cannot be considered final and immediately appealable." *In re Jones*, 9 F.3d 878, 879 (10th Cir. 1993) *citing Homa, Ltd. v. Stone (In re Commercial Contractors, Inc.)*, 771 F.2d 1373, 1375 (10th Cir. 1985) and *Balcor Pension Investors V v. Wiston XXIV Ltd. Partnership (In re Wiston XXIV Ltd. Partnership)*, 988 F.2d 1012, 1013 (10th Cir. 1993).

Additionally, the district court's order of remand was not final even in the context of the bankruptcy proceeding, because it did not "finally dispose of *discrete disputes within the larger case*. *In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1283 (2nd Cir. 1990)(quoting *In re Johns-Manville Corp.*, 824 F.2d 176, 179 (2nd Cir. 1987) and *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir.

1983)(emphasis therein))." *In re Fugazy Express, Inc.*, 982 F.2d 769, 775 (2nd Cir. 1992). The *Fugazy* court went on to explain:

> By "disputes" we do not mean merely competing contentions with respect to separable issues; rather, we apply the same standards of finality that we apply to an appeal under 28 U.S.C. § 1291. (citation omitted). Given the strong federal policy against piecemeal appeals, (citations omitted), a "dispute," for appealability purposes in the bankruptcy context, means at least an entire claim on which relief may be granted.

Id., at 775-76. Viewed in this context, there is not even a discrete dispute which remained before the district court for appellate review or which had been ultimately resolved by the bankruptcy court. Thus, the court of appeals' determination that there was no final judgment from which Petitioners could perfect their appeal under either 28 U.S.C. §158(d) or 28 U.S.C. §1291 should be beyond question.

B. No Appealable Interlocutory Judgment

Turning to the only other avenue of appeal, the question presented to the court of appeals was whether there was a basis for an interlocutory appeal. Undeniably, the Petitioners have neither requested, nor been granted, leave to file an interlocutory appeal, pursuant to either 28 U.S.C. § 158(a) or 28 U.S.C. § 1292(b). Thus, the only determination left is whether 28 U.S.C. § 1292(a)(1) is applicable.

Petitioners contend that the district court's partial affirmance "continued" the bankruptcy court's injunction.

However, it is important to note specifically what is the nature of the injunction of which Petitioners complain. The bankruptcy court's Memorandum Opinion[5] states in pertinent part:

> A debtor's discharge, once obtained, is protected by the injunctive provisions contained in 11 U.S.C. § 524. That section states:
>
> (a) A discharge in a case under title--
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

---

[5] The Memorandum Opinion is attached as Appendix "E" to the Petition for Writ of Certiorari and the above quoted language is found at 45a-46a.

And the bankruptcy court then proceeded to apply the statutory mandates to the specifics of this case, noting:

> John Nichols' Chapter 7 discharge operates as a injunction against the continuation of the state court suit, or any suit initiated as a result of the same facts, against John Nichols for the purpose of collecting, recovering or offsetting the claims raised in the state court suit as a personal liability of John Nichols. 11 U.S.C. §§ 524(a), 727; *In re Bouchelle*, 98 Bankr. 81 (Bankr. M.D. Fla. 1989).

The district court's partial affirmance simply acknowledged the existence of the statutorily imposed injunction and in no way granted, continued, modified, dissolved or refused to modify or dissolve an injunction which would invoke 28 U.S.C. § 1292(a)(1).

While the Petitioners contend that the district court's partial affirmance in essence "continued" the Section 524 injunction, the preponderance of authority would conclude otherwise. The Second Circuit in *Fugazy*, observed:

> An order that "continu[es]" an injunction is one that "extends the duration of the injunction," 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3924, at 84 (Supp. 1992), that is, one entered in circumstances where, " ' without such order, the injunction would stand dissolved by lapse of the time fixed in the original order.' " *Sierra Club v. Marsh*, 907 F.2d [210] at 213 [(1st Cir. 1990)] (quoting *Dreutzer v. Frankfort Land Co.*, 65 F. 642, 644 (6th Cir.

> 1895)). Thus, "to be classified as an 'order[] ... continuing' an injunction, a ruling must have a direct and demonstrable effect on the duration of a previously-issued injunction. In other words, the later order must extend or prolong the restraint." *Sierra Club v. Marsh*, 907 F.2d at 213.

In re Fugazy Express, Inc., 982 F.2d at 777. Since the district court order does not purport to alter the injunction, and, indeed, could not extend the effective period of the injunction granted by 11 U.S.C. § 524, then Petitioners' basis for an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) is equally untenable.

CONCLUSION

Just because the court of appeals found no appellate jurisdiction does not mean that there is a conflict with *Germain*. In *Germain*, this Court concluded that "[s]o long as a party to a proceeding or case in bankruptcy meets the conditions imposed by § 1292, a court of appeals may rely on that statute as a basis for jurisdiction." *Id.*, 112 S.Ct. at 1150. Fundamental to the exercise of appellate jurisdiction is the requirement that the facts meet the conditions imposed by statute invoking jurisdiction. Petitioners neither meet the conditions imposed by 28 U.S.C. §§ 158, 1291, nor 1292. As a result the Fifth Circuit Court of Appeals denial of jurisdiction was correct.

Therefore, Respondents John Floyd Nichols and Deena Counts Nichols would respectfully request that the Petition for Writ of Certiorari of Joe Alfred Izen, Jr., Conroe Office Building, Ltd. and L. T. Bradt be denied.

Respectfully submitted,

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